

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	CASE NO. 04-94649
	:	
JOHNNY RAY JAMES,	:	
	:	
Debtor.	:	CHAPTER 7
_____	:	

ORDER

This closed Chapter 7 case is before the Court on several motions filed by the debtor *pro se*. Debtor filed a "Motion to Avoid Judicial Liens" (# 20) on December 21, 2004, attempting to avoid the liens of the Georgia Department of Revenue. On that same day, debtor filed a pleading styled "Motion for Order Requiring the Georgia Department of Revenue to Show Cause Why It Should Not Be Adjudged in Contempt for Willful Violation of Order for Discharge" (# 19). On January 5, 2005, debtor filed a motion to reopen the case in order to pursue his contempt motion against the Georgia Department of Revenue (# 17), and on January 11, 2005, debtor filed two more motions to reopen the case, which he styled as a "Motion to Reopen Case for Order Requiring the Internal Revenue Service to Show Cause Why It Should Not Be Adjudged in Contempt for Willful Violation of Order for Discharge" (# 22) and a "Motion to Reopen Case for Order Requiring the Georgia Department of Revenue to Show Cause Why It Should Not Be Adjudged in Contempt for Willful Violation of Order for Discharge" (# 21). After considering the motions and the applicable law, the Court concludes that the motions should be denied.

Debtor filed this Chapter 7 case on June 14, 2004. In his schedule E, debtor listed both the Internal Revenue Service (the “IRS”) and the Georgia Department of Revenue as unsecured creditors with priority claims. He listed the IRS with claims of \$14,181.85 for 2001, \$2,099.00 for 2002, and \$1,196.00 for 2003, and he listed the Georgia Department of Revenue with claims of \$2,837.00 for 2001, \$2,392.19 for 2002, and \$1,763.00 for 2003. In his schedule F, debtor listed the IRS and the Georgia Department of Revenue as unsecured creditors with nonpriority claims for income taxes for 2000. Debtor did not file any complaints to determine the dischargeability of these tax debts while the case was pending. On November 12, 2004, the debtor received his discharge, and the case was closed on December 3, 2004.

In his December 21, 2004 motion to avoid lien, debtor seeks to avoid a tax lien held by the Georgia Department of Revenue. In both his December 21, 2004 motion to hold the Georgia Department of Revenue in contempt and his January 5, 2005 and January 11, 2005 motions to reopen this case to prosecute a motion to hold the Georgia Department of Revenue in contempt, debtor requests that the Court impose monetary sanctions on the Georgia Department of Revenue for attempting to collect a tax debt after he received his bankruptcy discharge. It appears that debtor misunderstands the effect of his bankruptcy filing on his tax debt.

Debtor’s motion to avoid lien is styled as a motion to avoid “judicial” liens and states that it is brought pursuant to 11 U.S.C. § 522(f) and Fed. R. Bankr. P. 4003(d). Debtors may avoid judicial liens and nonpossessory, nonpurchase-money security interests to the

extent such liens impair the debtor's exemption in certain property under § 522(f). 11 U.S.C. § 522(f) (2005); 4 COLLIER ON BANKRUPTCY ¶ 522.11[1] (15th ed. 2003). However, the lien debtor seeks to avoid is a tax lien, not a judicial lien, and a tax lien may not be avoided under § 522(f). *In re: Khoe*, 255 B.R. 581, 588 (E.D. Cal. 2000). The law is clear that debtor cannot remove tax liens from otherwise exempt property. *DeMarah v. United States (In re: DeMarah)*, 62 F.3d 1248, 1252 (9th Cir. 1995); *In re: Swafford*, 160 B.R. 246, 248 (Bankr. N.D. Ga. 1993). Thus, debtor's motion to avoid the Georgia Department of Revenue's tax lien must be and is hereby DENIED.

Debtor's motions to reopen this case to prosecute motions to hold the Georgia Department of Revenue and the IRS in contempt must also be denied. A closed case may be reopened pursuant to 11 U.S.C. § 350 (b) which provides as follows:

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 350 (b) (2005). If reopening a bankruptcy case would serve no purpose, then cause to reopen does not exist. *Chase Automotive Finance, Inc. v. Kinion (In re: Kinion)*, 207 F.3d 751, 756-57 (5th Cir. 2000); *Horizon Aviation of Virginia, Inc. v. Alexander (In re: Horizon Aviation of Virginia, Inc.)*, 296 B.R. 380, 382 (E.D. Va. 2003). Since debtor's motions to hold the Georgia Department of Revenue and the IRS in contempt cannot be granted, there is no purpose in reopening this case.

Debtor's motions to hold the Georgia Department of Revenue and the IRS in contempt assume that these agencies are attempting to collect tax debts that were discharged.

The discharge injunction in § 524(a)(2) of the Bankruptcy Code applies only to discharged debts. *Payne v. United States (In re: Payne)*, 306 B.R. 230, 233 (N.D. Ill. 2004); *United States v. Ellsworth (In re: Ellsworth)*, 158 B.R. 856, 858 (M.D. Fla. 1993).

Section 523(a)(1) excepts certain tax debts from discharge.¹ A tax debt is not discharged if the tax return for that tax period was due later than three (3) years before the

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Section 523(a)(1) provides as follows:

(a) a discharge under section 727, 1141, 1128(a), 1128(b), or 1328(b) of this title does not discharge an individual from any debt -

(1) for a tax or customs duty -

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required -

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(iii) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

11 U.S.C. § 523(a)(1) (2005) (emphasis added).

Section 507(a)(8) provides as follows:

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for -

(A) a tax on or measured by income or gross receipts-

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

....

11 U.S.C. § 507(a)(8) (2005).

petition date, and the discharge will not bar the collection of such nondischargeable tax debts. *Khoe*, 255 B.R. at 587; 4 COLLIER ON BANKRUPTCY ¶¶ 523.07[2][a], 523.07[6] (15th ed. 2003). In the instant case, three years prior to the petition is June 14, 2001, and thus, any tax debts that the debtor incurred in years for which the tax return was due after June 14, 2001 are nondischargeable.

It is unclear from debtor's proposed motions to hold the Georgia Department of Revenue and the IRS in contempt whether the tax debts at issue were affected by the Chapter 7 discharge. It appears that debtor's motions may relate to taxes for 2002 and 2003. Tax returns for 2002 and 2003 were both due after June 14, 2001, and thus, these debts would not have been discharged. Again, the discharge injunction does not apply to debts which were not discharged, and debtor's contempt motions could not be granted.

Debtor also argues that the taxing entities failed to file a complaint to determine the dischargeability of the debts by September 17, 2004 and that they waived any objection to the discharge of the tax debts. Debtor is again mistaken on the law. The September 17, 2004 deadline in the Notice and Order for relief applies on its terms to complaints filed under § 523(c), not complaints to determine the dischargeability of tax debts under § 523(a)(1). *See* Fed. R. Bankr. P. 4007 (2005); *Richmond v. United States*, 234 B.R. 787, 793 (S.D. Cal. 1997) (citing *Kelly v. Robinson*, 479 U.S. 36, 42-43 n.4, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986)). Thus, the fact that neither the Georgia Department of Revenue nor the IRS filed complaints to determine the dischargeability of the tax debts by September 17, 2004 is irrelevant and does not constitute a waiver by those entities. Finally, debtor has not addressed the sovereign

immunity issue with respect to the Georgia Department of Revenue. *See Georgia Higher Education Assistance Corp. v. Crow (In re: Crow)*, 2004 WL 2965458 at *2 (11th Cir. 2004).

In conclusion, debtor's *pro se* motions to avoid liens and to hold the Georgia Department of Revenue and the IRS in contempt cannot be granted, and thus, there would be no purpose to reopening this bankruptcy case. Accordingly, the debtor's motions to reopen are hereby DENIED.

IT IS SO ORDERED, this _____ day of January, 2005.

JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

Georgia Department of Revenue
Bankruptcy Section
P.O. Box 161108
Atlanta, Georgia 30321

David E. Nahmias
United States Attorney
P.O. Box 901
Atlanta, Georgia 30370

Georgia Department of Revenue
Centralized Taxpayer Accounting
P.O. Box 105499
Atlanta, Georgia 30348-5499

Johnny Ray James
1032 Shepperton Court
Jonesboro, GA 30238

Georgia Department of Revenue
Income Tax Division
P.O. Box 105613
Atlanta, Georgia 30348-5613

Georgia Department of Revenue
Beverly Campbell, Manager
1800 Century Center Boulevard
Atlanta, Georgia 30345-3205

Internal Revenue Service
Dennis Paiz, Operations Manager, Exam
SC Support
1973 North Rulon White Boulevard
Ogden, Utah 84404

Department of Treasury
Internal Revenue Service
401 West Peachtree Street
Atlanta, Georgia 30308

Internal Revenue Service
Attn: Bankruptcy Unit
P.O. Box 995, Stop 335D
Atlanta, Georgia 30370

Department of the Treasury
Internal Revenue Service
Austin, Texas 73301-0010